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UNITED STATES DISTRICT COURT
 SOUTHERN DISTRICT OF CALIFORNIA

JAMES M. KINDER,)	Case No. 07-cv-02132-DMS-AJB
)	
Plaintiff,	)	Judge: Dana M. Sabraw
	)	Mag. Judge: Anthony J. Battaglia
-against-)	
	)	DEFENDANT'S REPLY
NATIONWIDE RECOVERY SYSTEMS, LTD.,	)	MEMORANDUM IN
	)	RESPONSE TO PLAINTIFF'S
Defendant.	)	OPPOSITION MEMORANDUM
	)	TO DEFENDANT'S MOTION
	)	FOR PARTIAL JUDGMENT ON
	)	THE PLEADINGS
)	
	)	Date: January 22, 2008
	)	Time: 10:30 A.M.
	)	Courtroom: 10

I. INTRODUCTION

Defendant, Nationwide Recovery Systems, Ltd. ("NRS"), submits this memorandum in response to the opposition memorandum filed by plaintiff, James M. Kinder, in opposition

1 to NRS's Motion for Partial Judgment on the Pleadings.

2 Plaintiff's opposition memorandum is misleading and inaccurate. First, contrary to
3 plaintiff's argument, the Court *cannot* create a private right of action for violations of the
4 Telephone Consumer Protection Act of 1991 ("TCPA"), 47 U.S.C. § 227, and the related
5 regulations, when Congress has specifically withheld such a private right of action. Further,
6 and again contrary to plaintiff's allegations, there is no need for the Court to create a private
7 cause of action. As numerous courts have ruled, the states may bring an action on behalf of
8 their citizens for violations of 47 U.S.C. § 227(d) and 47 C.F.R. § 64.1200. *See, e.g.,*
9 *Boydston v. Asset Acceptance LLC*, 496 F.Supp.2d 1101, 1106 (N.D. Cal. 2007). Like the
10 TCPA, several other federal statutes do *not* have private civil remedies, but instead are
11 enforced by some federal or state regulatory agency. *See, e.g., Nelson v. Chase Manhattan*
12 *Mortgage Corp.*, 282 F.3d 1057 (9th Cir. 2002) (There is no private right of action to enforce
13 the provisions of section 1681s-2(a) of the Fair Credit Reporting Act, 15 U.S.C. § 1681, *et*
14 *seq.* Section 1681s-2(d) expressly limits enforcement of subsection (a) to the federal agencies
15 and officials and state officials enumerated in § 1681s.); *Acara v. Banks*, 470 F.3d 569 (5th
16 Cir. 2006) (The Health Insurance Portability and Accountability Act (HIPAA), provides no
17 private cause of action and limits enforcement of the statute to the Secretary of Health and
18 Human Services.). This practice is common and does *not* "encourage violations," or render
19 the federal statute or regulations "entirely ineffective," as plaintiff contends.

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23 Second, the unpublished decisions cited by plaintiff are unpersuasive and have been
24 rejected by several courts.

25 Third, as this Court ruled *in another lawsuit filed by plaintiff, Kinder v. Citibank*, 2000
26 WL 1409762, *3 (S.D. Cal. 2000), jurisdiction over TCPA claims is *not* vested exclusively in
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1 state courts. This Court may exercise diversity jurisdiction over TCPA claims. *Id.* In light of
 2 this fact, this case was properly removed to this Court per 28 U.S.C. § 1332.

3 **II. LAW AND ARGUMENT SUMMARY**

4 **A. This Court Should Not Create A Private Cause Of Action**

5 Plaintiff alleges, “[i]f TCPA victims have no private right of action for violations of 47
 6 C.F.R. § 64.1200(b)(1) and 47 C.F.R. § 64.1200(b)(2), those regulations cease to have any
 7 effect.” Docket No. 17, at p. 4, Ins. 2-4. Plaintiff’s allegation is false.

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 9 The threshold question before the Court is: Who has standing to assert a TCPA claim
 10 against an entity based on alleged violations of 47 C.F.R. § 64.1200(b)(1) and 47 C.F.R. §
 11 64.1200(b)(2)? Congress has answered this question—only the states have standing to assert
 12 these claims. *See, e.g., Boydston*, 496 F.Supp.2d at 1106; *Kopff v. Battaglia*, 425 F.Supp.2d
 13 76, 90-91 (D. D.C. 2006); *Klein v. Vision Lab Telecommunications, Inc.*, 399 F.Supp.2d 528,
 14 539 (S.D. N.Y. 2005); *Adler v. Vision Lab Telecommunications, Inc.*, 393 F.Supp.2d 35, 38-
 15 39 (D. D.C. 2005) (“Defendants contend the TCPA does not provide a private right of action
 16 for such a claim. Based on the plain language of the statute, the Court agrees. The private
 17 right of action established by § 227(b)(3) limits the right to ‘an action based on a violation of
 18 *this subsection* [i.e., subsection (b)] or the regulations prescribed under *this subsection*.’ 47
 19 U.S.C. § 227(b)(3) (emphasis added). The regulations cited by plaintiffs, however, were
 20 issued pursuant to a directive in § 227(d).”).

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 23 Further, contrary to plaintiff’s argument, “the fact that a federal statute has been
 24 violated and some person harmed does not automatically give rise to a private cause of action
 25 in favor of that person.” *Cannon v. University of Chicago*, 441 U.S. 677, 688 (1979).
 26 “Instead, [the court’s] task is limited solely to determining whether Congress intended to
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1 create the private right of action asserted And as with any case involving the
 2 interpretation of a statute, [the] analysis must begin with the language of the statute itself.”
 3 *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979). As noted, courts have ruled that
 4 the statutory language does *not* grant a private right of action, as plaintiff maintains.

5 **B. Plaintiff's Unpublished Authorities Should Be Disregarded**

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 7 Plaintiff string cites several unpublished decisions for the proposition that “[s]tate
 8 courts in New Jersey, Colorado, Ohio, Missouri and South Carolina have all determined that
 9 there is a private right of action for violations of the technical and procedural requirements
 10 associated with the TCPA found in the Code of Federal Regulations.” Docket No. 17, at p. 4,
 11 Ins. 19-21. Because the cited cases are unpublished, and copies of the decisions were not
 12 filed, undersigned counsel has been unable to review the opinions. Regardless, several courts
 13 have found these unpublished cases to be unpersuasive and contrary to the clear statutory
 14 language. *See, e.g., Klein*, 399 F.Supp.2d at 540 (“We are not persuaded by plaintiffs’ claim
 15 that ‘there is a growing consensus among courts from different states that violations of the
 16 identification requirements under § 68.318(d) are actionable under 47 U.S.C. § 227(b).’ Nor
 17 do we find convincing the justification, if any, that these cases provide.”) (citations omitted).

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 19 **C. This Court Has Diversity Jurisdiction Over Plaintiff's TCPA Claims**

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 21 Three Federal Courts of Appeal, including the Second, Seventh, and Tenth Circuits,
 22 have ruled that diversity jurisdiction may be exercised over TCPA claims, with the Seventh
 23 Circuit ruling that both diversity jurisdiction *and* federal question jurisdiction may be
 24 exercised over TCPA claims. *See Gottlieb v. Carnival Corp.*, 436 F.3d 335 (2d Cir. 2006);
 25 *Brill v. Countrywide Home Loans, Inc.*, 427 F.3d 446 (7th Cir. 2005); *US Fax Law Center,*
 26 *Inc. v. iHire, Inc.*, 476 F.3d 1112 (10th Cir. 2007).

1 The Ninth Circuit has ruled that federal courts may *not* exercise federal question
 2 jurisdiction over TCPA claims. *See Murphey v. Lanier*, 204 F.3d 911 (9th Cir. 2000). This
 3 Court has ruled “*Murphey* stands for [the] narrow jurisdictional [proposition] [that] . . . the
 4 generic federal question jurisdiction statute . . . does not apply [to TCPA claims]. Nothing in
 5 the Ninth Circuit’s analysis suggests that the TCPA *precludes* district courts from hearing
 6 private TCPA claims where some other independent basis for federal jurisdiction exists, *such*
 7 *as diversity of citizenship or supplemental jurisdiction.*” *Kinder v. Citibank*, 2000 WL
 8 1409762, *3 (S.D. Cal. 2000) (emphasis added).

10 As set forth in NRS’s removal pleadings, this Court has diversity jurisdiction over
 11 plaintiff’s TCPA claims. *See* Docket No. 1. In light of this fact, plaintiff’s argument that
 12 “deference” should be given to the unpublished state court decisions makes no sense. *See*
 13 Docket No. 17, at pp. 5-7, lns. 13-13.

15 **III. CONCLUSION**

16 The Court should grant NRS’s Motion for Partial Judgment on the Pleadings.
 17 Plaintiff’s TCPA claim relating to the “prerecorded telephone messages” fails to state a claim
 18 for relief.

19 Dated: January 15, 2008

Sessions, Fishman & Nathan in California, L.L.P.

21 /s/ Debbie P. Kirkpatrick

22 Debbie P. Kirkpatrick

23 Attorney for Defendant,

24 Nationwide Recovery Systems, Ltd.